MINACHI & ANOR. v. MOHAMED YUSOF BIN ZAKARIA

[O.C.J. (Gunn Chit Tuan J.) July 6, 8 and September 2, 1977] [Penang — Civil Suit No. 42 of 1975]

Negligence — Road accident — Contributory negligence — Apportionment of liability.

Damages — Quantum — Claim brought on behalf of dependent family — Deceased 4/5 liable for accident — Civil Law Act, 1956, ss. 7 & 8.

A collision between a motorcycle ridden by the defendant and a bicycle ridden by one *M.* resulted in the latter's death. The plaintiffs, as administrators of *M's* estate brought an action for the benefit of the deceased's estate as well as for the benefit of the deceased's dependants, his wife aged 28 years, his son aged 12 years and his daughters aged 9 and 11 years respectively. They claimed that the said collision was caused by the negligence of the defendant

The deceased, a labourer, had earned a monthly salary of $212.

Held: (1) in the circumstances of this case the deceased was 4/5 responsible for the accident while the defendant was only 1/5 to blame;

(2) as the deceased was 35 years old at the time of the accident, damages was assessed at 15 years' purchase. General damages was assessed at $16,192.28 under section 7 of the Civil Law Act, 1956 and $750 for special damages. In view of the finding on contributory negligence, only 1/5 of the amount of general damages should be paid.

Cases referred to:-

(1) *Govinda Raju & Anor.* v. *Laws* [1966] 1 M.L.J. 189, 190.

(2) *Joginder Kaur & Anor.* v. *Malayan Banking Ltd. & Anor.* [1971] 1 M.L.J. 98.

Gunn Chit Tuan J.: According to the statement of agreed facts, a collision occurred on the 13th day of February, 1974, at about 11.40 p.m. along Jalan Telok Ayer Tawar, Butterworth, Province Wellesley between a motor-cycle No. AG 533 driven by the defendant, Mohd. Yusof bin Zakaria, and a bicycle ridden by one Muniandy s/o Ramayah (deceased). The road where the collision occurred is a straight road and its surface was then dry. The defendant was travelling towards Butterworth Town from Telok Ayer Tawar.

The plaintiffs, as administrators of the estate of Muniandy s/o Ramayah, deceased, brought this action for the benefit of the deceased's estate as well as for the benefit of his dependants, namely:—

(a) Minachi d/o Rajagobal, wife, aged 28 years;

(b) Kanippan s/o Muniandy, son, aged 12 years;

(c) Kamachi d/o Muniandy, daughter, aged 11 years;

(d) Marima d/o Muniandy, daughter, aged 3 years.

They claimed that the said collision was caused by the negligence of the defendant and gave particulars of such negligence in their statement of claim. They also relied on the doctrine of *res ipsa loquitur.*

The only witness for the plaintiffs was the widow, Minachi d/o Rajagobal, who was herself one of the administrators of the deceased's estate. She was not an eye-witness of the accident and could only give evidence relevant to the question of damages. She claimed that her late husband earned $270 p.m. and when referred to paragraph 10 of her statement of claim where it was stated that the deceased was a labourer at the Royal Australian Air Force Base in Butterworth on a monthly salary of $212 p.m., she said that her late husband used to earn overtime pay in addition to a fixed salary of $212 p.m. She also claimed in court that the deceased gave her about $200 p.m. and when she was reminded that it was pleaded in her statement of claim that she received a housekeeping allowance of $180 p.m., she said that she did not know what was pleaded in the statement of claim by her lawyer who was instructed by her that she sometimes received $180 p.m. from her late husband and sometimes even more than that. She did not appear to me, and I found her not to be a truthful witness.

According to the defendant, there was a black-out that night when he reached the stretch of road near the Telok Ayer Tawar Reform School. He saw a cyclist on the left-hand side of the road travelling in the same direction on the bicycle track (see pages 3 and 4 of Exhibit "A"). All of a sudden, the cyclist made a turn from the left to the right. He was travelling at about 30 m.p.h. along the middle of his half of the road, and tried to avoid hitting the cyclist by swerving right to the middle of the road, but a collision took place. The motor-cycle hit the deceased's bicycle near the chain box when the cyclist turned right about fifteen feet away from him. The cyclist had no lights on when he made the turn, and it was not true, as alleged in the plaintiff's statement of claim, that he had knocked into the rear of the said bicycle.

Under cross-examination, the defendant said that he could see 100 feet ahead with the main beam of his headlights on. He denied that he was speeding and explained that when he saw the deceased turn right suddenly, he did not turn left because he thought that if he turned to the right the cyclist would apply his brakes.

Counsel for the defendant first referred to the case of *Govinda Raju & Anor.* v. *Laws,*[1] where Raja Azlan Shah J. (as he then was) said as follows:—

"What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence,"

and submitted that it was not negligence on the part of the defendant, who was perplexed or agitated when exposed to danger by the wrongful act of the deceased, to have swerved to his right towards the middle of the road rather than to turn to the left in which case the said collision could have been avoided.

Both counsel referred to the oft-quoted Federal Court case of *Joginder Kaur & Anor.* v. *Malayan Banking Ltd. & Anor.*,[3] where a cyclist was knocked down by a motor-car. The facts of that case are different in that the cyclist was travelling in the opposite direction to the motor-car and it was held that as the respondent driver had seen the bicycle he should have taken proper precautions against the cyclist not keeping his machine under control. It was also held that the driver should have reduced his speed and if that had been done the accident could have been avoided. In the circumstances of that case, the driver was held to be four-fifths responsible for the accident.

In the present case, on the evidence, both oral and documentary, adduced, I found that in spite of the absence of street lights along that stretch of road that

night, the defendant could see the deceased about 100 feet ahead with his headlights on as the latter was cycling towards Butterworth along the bicycle track. He did slow down as he said, but as the scratch mark (see JK on page 3 of "A") on the road was 39 feet long, I found that he was travelling at some speed just before the collision. Although one of the photographs shows that the deceased's bicycle had a lamp, the plaintiffs have not proved that it was in working condition and I had no reason to disbelieve the defendant and therefore found that the deceased had no lights on that night. According to the defendant, he first saw the cyclist turn round when he was about 15 feet away from him. That shows that he had not kept a continuous look-out although he was aware of the presence of the cyclist when he was about 100 feet away from him. Looking at the sketch plan on page 3 of Exhibit "A", I was of the view that the impact was somewhere before the point marked J where the skid started. I therefore found that the collision took place somewhere near the middle white line and at a point between the middle and the left-hand side of the road, half of which is about 13' 3" wide. A cyclist would have taken a longer time to travel about 13 feet compared to a motor-cyclist even if the latter was travelling at about 30 m.p.h. Therefore if the motor-cyclist had kept a continuous look-out on the deceased, he could have seen him turn suddenly more than 15 feet away. I therefore found that the motor-cyclist was negligent. But it was obvious that the deceased cyclist was also guilty of contributory negligence in riding a bicycle at night without lights and having turned round suddenly either without looking behind him first, or if he had done so, in crossing the road when he knew that there was an oncoming vehicle not far behind him. Looking at the right middle photograph on page 6 of Exhibit "A", I found that the bicycle was hit on the chain box by the defendant's motor-cycle when the deceased was at right angle to and had moved across part of the road in the path of the defendant's motor-cycle. In my opinion, the deceased's negligent act in turning and cutting across the road was the substantial cause of the accident. In the circumstances of this case, I therefore found that the deceased was four-fifths responsible for the accident whilst the defendant was only one-fifth to blame.

On the question of general damages, counsel for defendant pointed out that the $180 per month given to the widow included the cost of food for the deceased himself. He submitted that the amount required to feed the widow and the children would be $120 per month. As the deceased was 35 years' old at the time of his death, 20 years' purchase would be sufficient and one-third of the period should be deducted for contingencies. Counsel for plaintiffs, on the other hand, contended that only a few dollars a month were required to feed the deceased himself and that there should be 20 years' purchase at $180 per month. In my view, it would be reasonable to consider that the deceased's food would have cost $50 per month and I found that the widow and the children's loss of support was therefore $130 per month. I considered that the deceased, who was 35 years old at the time of his death, should have another 20 years' working life if he had not been killed in the accident. Allowing for the usual imponderables, 15 years' purchase would be reasonable and fair. On that basis I assessed general damages at $16,192.28 under section 7 of the Civil Law Act, 1956 (see annuity table on page 1014 of *Dass* on Quantum in Accident Claims). The conventional figure of $3,500 under section 8 is merged in the aforesaid higher award. I allowed $750 for special damages, which included $350 for the cost of applying for Letters of Administration and $400 for funeral expenses. In addition to the order for general and special damages, I also made the usual order for interest at 6% on the general damages from the date of service of the writ to the date of satisfaction and 3% interest on the special damages from the date of accident to the date of realisation. In view of my finding on contributory negligence, only one-fifth of the amount of general damages will represent the award to the plaintffs, out of which I also ordered that one-third thereof should be paid to the widow and the balance to be held in trust by the Public Trustee for the three minor children in equal shares. Finally, I ordered that one-fifth of the taxed costs on the lower scale be paid to the plaintiffs.

Order accordingly.

Solicitors: *V. Muthusamy & Co.; Ajmer Singh Sandhu & Co.*

MEK BINTI IDRIS v. NOR BIN AWANG

[O.C.J. (Mohamed Zahir J.) March 23 and September 7, 1977]
[Kota Bahru — Civil Suit No. 166 of 1974]

Land Law — Kelantan Land Settlement Ordinance 1955 — Aggrieved party bringing suit against District Officer under 16(1) of Ordinance — Procedures to be complied by aggrieved party — Kelantan Land Settlement Ordinance, 1955, ss. 5(1), 7, 8(1), 10, 16(1) & (2).

The subject matter of this case was a one-half share of a piece of land in which the plaintiff was the original owner. At the first hearing, the hearing officer ordered the said land to be registered in the name of the plaintiff under section 7 of the Kelantan Land Settlement Ordinance. The first defendant alleged that he bought the said land from the plaintiff's father and that he had been in occupation. He appealed to the District Officer under section 16(1) and the latter reversed the decision of the hearing officer and ordered that the defendant be registered under section 8(1) with a possessory title to the land. The plaintiff did not appeal against the order of the District Officer under section 16(1) but instead, he brought the suit under section 10 of the said Ordinance. The plaintiff claimed, *inter alia*, that she was the lawful registered proprietor of the said land and that the District Officer had acted *ultra vires* the provisions of the said Ordinance.

Held, striking out the plaintiff's claim: (1) if a person aggrieved by the decision of the District Officer was desirous of setting it aside on the same arguments pleaded before the latter then he had to do so by way of appeal under section 16(2) of the said Ordinance;

(2) the present case was not the assertion of a superior title by the plaintiff. It was a claim to set aside the order of the District Officer for being *ultra vires*, and the plaintiff should have appealed against the order.

Cases referred to:-

(1) *Deraman & Ors.* v. *Mek Yam* [1977] 1 M.L.J. 52.

(2) *Fatimah* v. *Wok* [1964] M.L.J. 318.

(3) *Som binti Daud & Ors.* v. *Nik Mustaffa bin Nik Idris & Ors.* [1978] 1 M.L.J. 13.